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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JORGE LUIS MAGANA CLEMENTE, Defendant and Appellant.	E064595 (Super.Ct.No. FWV1502277) OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller, Judge. Affirmed.

John E. Edwards, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Theodore M. Cropley, and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Jorge Luis Magana Clemente appeals from judgment entered following jury convictions for cruelty to animals (Pen. Code, § 597[1]; count 1) and attempted dog fighting (§§ 597.5, subd. (a)(2), 664; count 2). The trial court imposed three years of probation for defendant's convictions. Defendant contends the trial court committed prejudicial error by failing to give the jury a unanimity instruction sua sponte regarding count 2. We conclude a unanimity instruction was not required, and affirm the judgment.

II

FACTS

At around 5:00 p.m. on June 21, 2015, Donna Gahaney and her husband arrived at Donna's sister-in-law's home and parked across the street. Defendant was sitting on the curb with a bottle of whiskey, kicking his dog. Defendant kicked his pit bull hard in the ribs three times. The dog lay on the ground cowering. Defendant grabbed the dog by its fur, hugged it, bit the dog's face or ear, and bent one of the dog's legs backward at the shoulder. Defendant also twice placed the dog in a choke hold. As Donna got out of the car, she yelled at defendant to leave the dog alone and that she was going to call the police if he did not stop kicking the dog. Defendant said, "F--- you." Defendant told her to "go F-off and go beat [her] own F-ing dog."

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

After the Gahaney's left their car and went inside the front gate to Donna's sister-in-law's home, defendant got up from the curb, pulled the dog up on his feet by the scruff of his neck, and staggered toward the gate. Donna's husband said, "What are you doing? Get out of here." Defendant seemed drunk. He was slurring his words, he staggered when he walked, and his eyes were red and bloodshot.

Donna watched defendant as he walked away, down an alley. The pit bull was off the leash. Defendant picked up the dog, and from about the height of defendant, defendant "slammed" the dog down onto the ground. Defendant also threw a bottle at the dog. The bottle missed the dog and shattered on the pavement. A neighbor came out of his house and yelled at defendant. Donna saw defendant grab the dog's four legs and sling the dog around the back of his neck. After arguing and yelling with the neighbor, defendant walked into another backyard.

About five minutes later, Donna saw defendant walking back past the house where Donna was. The dog was on a leash with a chain around his neck. Defendant and the dog went back down the alley. Donna heard the father of Paul Gutierrez screaming and yelling from Paul's backyard, which was behind the house where Donna was. Donna did not see defendant walk into Paul's yard. She did not see defendant there until after his pit bull's jaws latched onto the face of Paul's dog through the wrought iron fence.

When Paul's dog, a boxer, howled, Paul ran outside as defendant was attempting to force his pit bull to release its jaws from the boxer's face. Paul's father yelled at defendant, "'Why the f--- did you bring your dog over here?'" Defendant grabbed the pit

bull and walked him on the leash toward the park. The pit bull had blood on its mouth but did not appear injured. The boxer's mouth was dripping blood.

Donna testified another neighbor told her that right before the Gahaney's arrived, defendant's dog had gone into the neighbor's backyard and she chased the pit bull out of her yard.

During this series of events, Donna called 911 three times. The recorded calls were played for the jury. Donna first called 911 at 6:42 p.m., while defendant was beating his dog and bending the pit bull's leg backwards and had told Donna to mind her own business and beat her own dog. The call ended as defendant was walking away with his pit bull not on a leash.

Donna made a second call to 911 at 6:58 p.m., after defendant threw his dog on the ground. While on the phone, defendant threw his whiskey bottle at the dog. Donna made a third call at 7:20 p.m., after the encounter between the pit bull and boxer ended and defendant walked to the park with his pit bull. During the third call, Donna stated, "The guy, the drunk guy is sending his pit bull into people's yards and they're attacking other dogs, he's doing it on purpose, uh he just got done beating the dog, now he just, now the dog just attacked another dog and now he's in someone's yard . . . ." While on the phone, Donna stated that the pit bull had just attacked a dog that was bleeding. She reported that defendant sent his dog into a neighbor's yard and it attacked their dog.

Paul testified that while at home on June 21, 2015, at around 6:42 p.m., he heard two dogs fighting. He ran outside and saw a pit bull on his property. The dog was about 15 yards from the sidewalk, outside Paul's wrought iron fence that circumscribed his

home. His boxer was on the other side of the fence, with the pit bull's jaws latched onto the boxer's upper lip through the wrought iron fence. Paul, Paul's father, Paul's nephew, and defendant tried to separate the two dogs.

After the dogs were separated, defendant picked up the pit bull and walked away. Paul followed defendant until he turned the corner to head toward the park. The pit bull was on a leash. While following defendant, Paul saw a chihuahua in the street barking at defendant and the pit bull. Defendant and his dog stopped. The pit bull sat down. Defendant turned his dog with the leash toward the chihuahua and kicked the pit bull hard three times in the rib area to make him aggressive. The pit bull lunged at the chihuahua while defendant held back his pit bull with the leash. There was no contact between the dogs. Defendant then walked away with the pit bull. As defendant turned the corner toward the ball park, Deputy King arrived at around 7:15 p.m. and took defendant into custody. The pit bull was taken by animal control.

III

UNANIMITY INSTRUCTION

Defendant contends the trial court should have sua sponte given a unanimity instruction regarding count 2, attempted dog fighting (§ 597.5, subd. (a)(2)).

A. Applicable Law

"In California, a jury verdict in a criminal case must be unanimous. [Citations.] Thus, our Constitution requires that each individual juror be convinced, beyond a reasonable doubt, that the defendant committed the *specific* offense he is charged with. [Citation.] Therefore, when the evidence suggests more than one discrete crime, either

(1) the prosecution must elect among the crimes or (2) the trial court must instruct the jury that it must unanimously agree that the defendant committed the same criminal act. [Citations.] The unanimity instruction must be given sua sponte, even in the absence of a defense request to give the instruction. [Citations.]" (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 569.)

The purpose of a unanimity instruction, such as CALCRIM No. 3500, is to prevent jurors from convicting a defendant based on different instances of conduct. (*People v. Hernandez, supra,* 217 Cal.App.4th at p. 569.) Giving a unanimity instruction "'"is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed."' [Citations.] Moreover, a unanimity instruction is '"designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count."' [Citation.] Thus, the instruction is given to ensure that all 12 jurors unanimously agree, and are unanimously convinced beyond a reasonable doubt, which instance of conduct constitutes the charged offense." (*Ibid.*)

"The failure to give a unanimity instruction 'has the effect of lowering the prosecution's burden of proof.' [Citation.] Accordingly, a failure to give the instruction when it is warranted abridges the defendant's right to due process, as it runs the risk of a conviction when there is not proof beyond a reasonable doubt." (*People v. Hernandez, supra,* 217 Cal.App.4th at p. 570.) In deciding whether to give the instruction, the trial

court must consider whether there is a risk the jury may divide on two discrete crimes and not agree on any particular crime. (*Ibid.*)

B. Discussion

Defendant argues the trial court was required to give a unanimity instruction on count 2 because the evidence showed that more than one criminal act was committed which could constitute the charged offense of attempted dog fighting, and the prosecution did not elect among the crimes. Defendant maintains there were two incidents upon which the jury could have found defendant guilty of attempted dog fighting, the incident in which the pit bull lunged at the chihuahua and the incident in which the pit bull latched onto the boxer's face.

Defendant cites *People v. Melhado* (1998) 60 Cal.App.4th 1529 (*Melhado*), for the proposition a unanimity instruction was required because the prosecution did not communicate in a clear and direct manner that the prosecution elected to seek conviction on count 2 based only on the boxer incident. Defendant further argues the prosecution "failed to plainly inform the jury that she was mentioning the attempted dog fighting with the Chihuahua *only* for the purpose of supporting a conviction for attempted dog fighting with the boxer, not also as a separate incident that could support a conviction."

In *Melhado, supra,* 60 Cal.App.4th 1529, the defendant was charged with a single count of making criminal threats to the manager of an auto repair business. There was evidence the defendant had made two separate threats the same morning, one at around 9:00 a.m. and the second around 11:00 a.m. The defendant stated during the first threat, "'I'm going to blow you away if you don't bring my car back. I'm going home and I'm

going to bring a grenade.'" (*Id.* at p. 1533.) During the second threat, the defendant held up a grenade and said: "'I'm going to blow you away,'" and "'I'm going to blow up this place. If I don't get this car by Monday, then I'm going to blow it away.'" (*Ibid.*)

The court held in *Melhado* that the trial court committed reversible error by not giving a unanimity instruction. (*Melhado, supra*, 60 Cal.App.4th at p. 1539.) The court explained: "As we have discussed, the evidence presented in this case established that appellant committed two acts of making terrorist threats, each of which could have been charged as a separate offense, yet the matter went to the jury on only one such offense. [Fn. Omitted.] Because the prosecution's election was never clearly communicated to the jury, the trial court should have instructed on unanimity. To hold otherwise would leave open the door to allowing a prosecutor's artful argument to replace careful instruction. If the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction. The record must show that by virtue of the prosecutor's statement, the jurors were informed of their duty to render a unanimous decision as to a particular unlawful act." (*Ibid.*)

In the instant case, the evidence was sufficient to support a conviction based on only a single incident, the boxer incident. The instant case is distinguishable from *Melhado* in that it involves charges of a single instance of attempted dog fighting and injury, not multiple instances of the charged crimes. Also, the prosecution and defense counsel both clearly conveyed to the jury that the charge was founded on the single incident of defendant's pit bull attacking and injuring a boxer.

In the instant case, the prosecution made it sufficiently clear that it elected to rely on the boxer incident and not the chihuahua incident as the basis of the attempted dog fighting charge. The information, jury instructions on attempted dog fighting, and closing argument all show that the prosecution elected to prosecute defendant only for the boxer incident. Count 2 of the information alleges defendant committed the crime of attempted dog fighting by "unlawfully and for amusement and gain, caus[ing] a dog to fight with another dog and caus[ing] dogs to injure each other."

In addition, the trial court instructed the jury on the crime of dog fighting as follows: "To prove the crime of dog fighting, the People must prove that: [¶] One, the defendant, for amusement or gain, willfully caused any dog to fight with another dog or willfully caused any dog to injure each other." The court also instructed the jury that to find defendant guilty of attempted dog fighting, the jury must find (1) "the defendant took a direct, but ineffective, step toward committing the crime of dog fighting" and (2) "the defendant intended to commit the crime of dog fighting." Under section 663, a defendant may be convicted of the crime of attempt even if it is proved he succeeded in committing the crime. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 610.)

Only the boxer incident qualified as an attempted animal fighting crime. The chihuahua incident did not qualify because, during the Chihuahua incident, the chihuahua and pit bull did not fight and neither dog was injured. Also, there was no evidence of an attempt because the pit bull was on a leash, which defendant used to prevent his dog from getting close enough to fight with the chihuahua. This reflected a lack of intent to cause a dog fight. The boxer incident, on the other hand, involved a brutal dog fight in which

there was evidence defendant took his dog onto Paul's property and allowed his dog to attack the boxer, which was on the other side of a fence. There was thus evidence of intent to cause a dog fight, and there was an actual brutal dog fight and injury to a dog.

Defendant argues the prosecution did not expressly inform the jury during closing argument that the prosecution elected to rely on only the boxer incident, and therefore there was the possibility the jury was divided on which of the two incidents supported an attempted dog fighting conviction. But even though the prosecutor did not expressly state it was making an election as to count 2, the record shows that the prosecutor, as well as defense counsel, made it quite clear count 2 was based solely on the boxer incident.

During the prosecutor's closing argument, the prosecutor argued that evidence of the boxer incident supported a conviction against defendant for the crime. The prosecutor argued: "So what are your facts? The evidence that supports this count? Well, Paul, my main witness in this particular count testified for you. Paul told you he was in his home. He actually indicated to you that the area where Mosley[**2**] was – that was his Boxer – was 15 yards from the sidewalk. That's important. Because earlier Donna told you that before Paul comes into the scene, she sees the defendant come back from the alleyway. The dog now has a leash and collar on. [¶] So at the time Paul comes into the facts of the case, the dog has a collar and leash on. Okay. And we know based upon the testimony all along from Donna, the dog is always next to the defendant. [¶] So this argument I make to you is that the defendant takes the dog, who was on a

2 The court reporter spells the boxer's name in the reporter's transcript as both "Mosley" and "Mosely."

leash, 15 yards from the sidewalk onto the property location where Paul was, 15 yards to where Mosley was behind the fence. [¶] Paul told you for two minutes the Pit Bull dog locked jaws. And the injuries he describe[s] to you was he kind of grabbed the upper lip of Mosely. It was cut and sliced." The prosecutor's argument focusses on the boxer incident during which defendant's pit bull attacked the boxer and tore the boxer's lip.

Defendant maintains that during closing argument the prosecutor referred to the boxer and chihuahua incidents as separate and distinct incidents, either of which could have supported a conviction for attempted dog fighting. Defendant notes that the prosecutor stated during closing argument: "I'm going [to] argue to you, [that] by the defendant trying to kick the Pit Bull, he was attempting to get that Pit Bull in a fight with the Chihuahua." The prosecutor further stated: "[Defendant] continues his fighting actions, right? Which is why I brought up the whole chihuahua incident."

But defendant takes these statements out of context. When the prosecutor's argument is considered in its entirety, it is quite clear count 2 is based solely on the boxer incident, and the prosecutor's statements regarding the chihuahua during closing argument were intended merely to support a finding that defendant intended that his dog fight the boxer. For instance, after discussing the boxer incident, the prosecution stated: "And then of course we had the Chihuahua incident. That is important because Paul actually described to you what he saw. And the reason I bring that up to you is because it supports the argument that the *defendant intended to fight with Mosley*, because nobody actually saw the defendant walk up to the fence. . . . [The Chihuahua incident] supports the argument that the *defendant intended to fight with Mosely*, because based upon what

Paul told you about the Chihuahua incident." (Italics added.) The prosecutor summarized the chihuahua incident facts, stating defendant was kicking the pit bull in an attempt to get the pit bull to fight the chihuahua. The prosecutor then stated, "We know the *defendant was attempting to fight with Mosely*. . . . [¶] And then of course, after the fighting happens with Mosely and Paul comes out, after breaking the dogs up, what does the defendant do? He continues his fighting actions, right? Which is why I brought up the whole Chihuahua incident." (Italics added.)

Defense counsel's closing argument also conveys to the jury that the attempted dog fighting charge was based solely on the boxer incident. Defendant's defense was that he was too drunk to form the requisite intent to cause a dog fight and there was no evidence the *fight* happened for amusement or gain. This defense reflects that there was no question that the attempted dog fight charge was founded solely on the boxer incident. Furthermore, during closing argument, defense counsel only discussed the boxer incident, with no mention of the chihuahua incident. Defense counsel made no mention of the chihuahua incident. Defense counsel argued regarding count 2: "The other particular thing about count 2, about the attempted animal fighting, nobody sees how it starts, right? We know he's fall-down drunk. We know the dog is on a leash, it has a collar. We also know it's a 70-pound Pit Bull. I think it's just as reasonable to assume he's walking down the street . . . and the dog has gone to approach Mosely at the fence and that's when the not walking occurred. [¶] We don't know what happened. We're not allowed to assume either. It's hard because no one know[s] anything about [Mosely]. We don't know anything about the Pit Bull fighting."

Under the circumstances in the instant case, no unanimity instruction was required. Evidence of the chihuahua incident was insufficient to support a conviction for attempted dog fighting. Even if the evidence and the prosecutor's statements during closing argument regarding the chihuahua incident created a risk the jury might divide on the boxer and chihuahua incident and not agree on any particular crime on count 2, a unanimity instruction was not required because the prosecution made it sufficiently clear count 2 was based only on the attack involving the boxer.

Furthermore, even if there was error in not giving a unanimity instruction, such error was harmless. There was overwhelming evidence supporting defendant's conviction for attempted dog fighting under either the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24) or *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 836) prejudicial error standard. There was undisputed evidence defendant's dog attacked the boxer and tore the boxer's lip. The boxer was on a leash at the time. The attack required the pit bull to traverse across 15 yards of Paul's property to reach the boxer, which was behind a wrought iron fence. In addition, Paul's father yelled at defendant, "Why the f--- did you bring your dog over here?" Also, Donna stated during a recorded 911 call that defendant "is sending his pit bull into people's yards and they're attacking other dogs, he's doing it on purpose." Based on this evidence, it is highly probable, beyond a reasonable doubt, that the jury found defendant intended that his dog attack the boxer, and that the jury was unanimous in finding defendant guilty of attempted dog fighting based on the boxer incident. Any disagreement by the jury in this regard is not reasonably probable. (*Melhado, supra,* 60 Cal.App.4th at p. 1539.)

IV

DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

MILLER
J.